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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

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CATHERINE SCHLEMMER, PLAINTIFF IN ERROR,

vs.

THE BUFFALO, ROCHESTER AND PITTSBURGH RAILWAY COMPANY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF PENNSYLVANIA.

BRIEF FOR PLAINTIFF IN ERROR.

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Preliminary Statement.

Catherine Schlemmer, widow of Adam M. Schlemmer, deceased, in her own right and on behalf of her two minor children, instituted this action of trespass in the court of common pleas of Jefferson county, Pennsylvania, on March 20, 1901, against the defendant in error, The Buffalo, Rochester and Pittsburgh Railway Company, a corporation organized under the laws of Pennsylvania and engaged as a common carrier in operating a line of railroad between Butler, in said State, and Rochester and Buffalo, in the State of

New York (1, 3, 53), to recover damages for the wrongful killing of said deceased.

Adam Schlemmer, on August 5, 1900, was in the employ of the defendant company performing the duties of flagman or rear brakeman on one of defendant's freight trains, and during the early evening of that date, while endeavoring to make a coupling under the direct orders of his immediate superior, the conductor of the train, his head was caught between the cars and so badly crushed that he died immediately thereafter.

The gravamen of the complaint against the defendant company is that one of the cars which Schlemmer was ordered to couple up and upon which he was working at the time of the accident was not equipped with "a legal coupler or coupling, as required by existing law," although the defendant was then engaged in transporting said car from Limestone, in the State of New York, through the State of Pennsylvania (4).

Damages were laid in the sum of $10,000 (4).

Defendant pleaded "Not guilty" (6), and the issue came on for trial at a regular term of the court of common pleas for the county of Jefferson, before a judge and jury (14). At the conclusion of plaintiff's evidence defendant moved for a compulsory nonsuit, on the ground that there was "no proof of any negligence on part of defendant in this cause," and because the evidence showed "that deceased was guilty of contributory negligence." This motion was granted, "with leave to the plaintiff to make a motion to take same off within four days" (9).

Within the time limited plaintiff moved the court to take off the compulsory nonsuit for, among others, the following reasons:

(*a*) The court erred in ruling as matter of law that the plaintiff was not entitled to recover in this case.

(*b*) The evidence showed that the deceased was not negligent and used all the care demanded by the circumstances.

(*c*) That under the United States statute (Act of March 2, 1893, 27 Stats., 532) specially pleaded in this case the deceased should not be deemed to have assumed the risks incident to the particular service he was performing, "owing to the fact that the car was not equipped with an automatic coupler."

(*d*) That the undisputed evidence showed that the defendant company had violated the law in such regard "and was, therefore, guilty of negligence which caused decedent's death."

(*e*) That the coupling which the deceased had attempted to make "was complicated, difficult, and dangerous" and the car coupler which he was required to handle in making such attempt was "not a reasonably safe appliance."

(*f*) That the car which was attempted to be coupled was of peculiar construction and was the first and only one of that pattern which had been handled by the deceased and his associates in many years of experience. It was equipped with an unusual and non-automatic coupler, which would not couple by impact, was without deadheads or bumpers, and the defendant company in accepting it for transportation, while "thus equipped," was guilty of negligence *per se* (10).

On the hearing the court held that the car in question "was not a car used in interstate commerce," such not being "its purpose nor the use to which it was being put," and, further, that even if it were "construed to come under the provisions of said act (the act of Congress of March 2, 1893, 27 Stats., 532), plaintiff could not recover, because the evidence "showed the decedent to be guilty of negligence that contributed to his death" (12).

The motion to take off the compulsory nonsuit was refused (13).

From such refusal plaintiff appealed to the Supreme Court of Pennsylvania, which court affirmed the judgment of the trial court (56).

To review such action the case comes before this court on writ of error.

Statement of Facts.

The defendant company, a few days prior to August 5, 1900, had received for transportation over its line, from Limestone, in the State of New York, to a point in Pennsylvania, a construction train consisting of seventeen cars and a steam shovel car. That train was hauled into defendant's yard at Du Bois, Pennsylvania, on the afternoon of said date and left on a side track therein (15).

Plaintiff's decedent, who had been serving defendant as a brakeman and flagman for three or four years (20), was a member of the freight crew which was ordered to take the construction train from Du Bois to Punxsutawney, Pennsylvania (39, 43). The crew, in obedience to orders, went into the yard with an engine and caboose. The caboose was left temporarily on the main track. The engine went on to the siding, coupled on to the forward end of the construction train, drew it out of the siding onto the main track, and backed it, the shovel car being at the rear end, toward the caboose, in order that it might be coupled to the caboose (17). The caboose was equipped with an automatic coupler of the M. C. B. type, and known as a Trojan coupler (26). The shovel car was equipped with a cast-iron drawhead fastened two or three feet back from the end of and underneath the body of the car; to this cast-iron drawhead there was fastened, by means of a pin passing through the hole in the drawhead, a drawbar three or four feet in length, weighing about eighty pounds. The unattached end of the drawbar had play up and down from about 27 inches above the rails to 36 or 37 inches above the rails, and had a pin-hole, or eye, therein which had to

be used in making fast to the coupler of the caboose. When horizontal the drawbar extended about a foot beyond the end of the shovel car. There was no projecting drawhead, bumper, buffer, or dead-woods to keep the body of the shovel car from coming against the caboose to which it was to be attached, and the box or body of the shovel car was of a height which allowed it to pass or lap over the drawhead and buffer of the caboose (16, 27, 43).

Schlemmer was directed to make the coupling between the caboose and the shovel car. To do this he had to go between the cars, take hold of the heavy drawbar hanging under the shovel car, and, while stooping or squatting, to keep his head and body below the level of the bottoms of the approaching cars, had to raise and guide the free end of the drawbar—the shovel car all the time slowly moving forward—into the small slot or hole (two by three inches) in the automatic coupler or knuckle on the caboose, the end of the drawbar being about the same size as the slot in the coupler on the caboose (25, 26, 35).

The rules of the company required brakemen "to sign for a stick" (22), but you could not stand "away outside and couple that link and not be in any danger at all." You could not "have made this coupling with a stick." "The pin was too heavy." "You could not have obeyed the rules of the company and made it with the stick" (23).

It was dusk and signals were being made with a lighted lantern. Schlemmer had his lantern with him, whether in his hand or on the ground does not appear. The conductor of the crew was standing to one side of the caboose as the train backed toward it and he called to Schlemmer to keep his head down. Schlemmer carefully endeavored to make the coupling, but the drawbar on the shovel car slipped by the coupler on the caboose and he failed to do so. The top of his head was caught between the bottoms of the shovel car and caboose and so badly crushed that he died almost immediately.

The steam shovel was a Martini steam shovel, used in construction work in building railroads (15); it was a machine on wheels (21); the wheels were regular, ordinary wheels, and it had two sets of trucks, a truck under the back part and a truck under the front part, just the same as any other truck (23); it was equipped with a drawhead and drawbar (15); the drawhead was "under the box of the car," between two and three feet, or "about two and one-half feet from the end of the car;" the drawbar was about three feet long and "would project past the end of the shovel car about a foot; it would weigh in the neighborhood of 75 or 80 pounds (16, 25); it had a pin-hole through its free end" (16); to make this coupling a man "would have to get between the cars, the steam shovel car, and the caboose, or else get down under" them; the drawbar had to be raised up and entered into the drawhead of the caboose, and the pin dropped down through (26); to avoid accident, it was necessary to keep down when you raised the drawbar—to keep your head down; he had to get down under; if you kept your head down and made the coupling, there was no danger (30); if a man making that coupling should miss it and not make it, there was nothing to keep them (the cars) from coming together; it was a dangerous coupling to make (34); the casting (drawhead) was of standard height and set under the body of the car (39); the drawbar, when it hung down, hung so it was 27 or 28 inches from the ground; it could be raised to 36 or 37 inches; if the drawbar was held up even with the drawhead (of the caboose), they would not come together, but in case it happened as it did, the drawbar not being raised high enough and got under the car, it would permit them to come together (43); to make the coupling with the caboose, the flagman "would have to get down underneath the car, and get down on the ground," "and hold up this drawbar," "and enter it into the drawhead of the caboose" (48); it was necessary to keep down in order to avoid danger; "if you keep down you are all right, if it

came back steady enough so he did not get run over" (49); any coupling that requires a person to go between the cars is dangerous (50).

The yard conductor testified that the freight conductor had his lantern lighted and stepped out and gave a signal to stop when the flagman went to make the coupling. "I seen he was too high * * * and I told him to keep down. He had got down, but raised his head up and I hallooed again (17), and I seen he was going to get pinched, and I turned my head away, and as soon as the cars parted enough to get through, I got through between the cars and the caboose and helped pick the man up. The top of his head was crushed." He had raised his head too high; there were dead-heads on the caboose, but not on the shovel car. When he attempted to make the coupling he missed it (18); when he raised the drawbar up in that drawhead to the patent coupler, the drawbar slipped by the drawhead, and the caboose and the end of the shovel car came together. The accident occurred between eight and nine o'clock (19). That was the only shovel car that the deceased was ever known to have handled (22).

At time of his death deceased was thirty-one years old, in good health, a steady worker, and his wages averaged from $65 to $80 a month (52).

Other than as above set forth, there was no testimony given at the trial upon which the defense of contributory negligence can be rested.

Jurisdiction.

In her declaration or statement of case the plaintiff asserted that the coupling of the shovel car "was exceedingly complicated and dangerous;" that it was not provided with "dead-woods," and "the drawhead itself was what is known as an old-fashioned one, not being a patent one or safe in any respect;" and that "said coupler was not a legal coupler or

coupling, as required by existing laws on" * * * August 5, A. D. 1900; that defendant was transporting said shovel car from Limestone, in the State of New York, through the State of Pennsylvania."

Wherefore plaintiff, "on account of defendants' negligence and carelessness, as aforesaid, in causing the death of her said husband, has brought this action."

In the course of the trial, in response to a ruling of the court upon the admissibility of certain evidence, counsel for plaintiff replied, "We will come to this, that under the United States statute they (defendants) are required to furnish a safety coupler" (17).

Before closing her evidence, plaintiff pleaded, "especially as part of the law in the case," the act of Congress of March 2, 1893, 52d Congress, 2 sess., c. 196; 27 Stats. L., 532 (53).

Plaintiff having rested, defendant moved for nonsuit on the ground, among others, that "the deceased failed to keep his head at least as low as the floor of the steam shovel; that this omission was the fault of the deceased exclusively; that deceased was guilty of contributory negligence and there could be no recovery in this case" (54).

This motion was sustained and nonsuit entered, with leave to plaintiff to move "to take it off" (54).

Plaintiff's motion to take off nonsuit as heretofore stated was rested upon the grounds that—

(1) The action of the defendant company in accepting for transportation the shovel car so equipped was in violation of law and constituted negligence which caused decedent's death.

(2) That the evidence established the fact that in attempting to make the coupling deceased was working by lantern light, and that he used all reasonable care demandable of him under the circumstances.

(3) That under the United States statutes specially pleaded in this case the decedent should not be deemed to have assumed the risks incident to the non-equipment of the shovel car with an automatic coupler (9, 10).

These grounds were severally urged upon the court in argument (10).

The trial judge refused to remove the nonsuit, holding, among other things, that—

> A citation of authorities is not necessary to show that the defendant company is not to be held for negligence because of the fact that it has undertaken to convey a steam shovel, equipped with a means of coupling which is not of the latest device, or even if it were dangerous, where the brakeman understood or was made aware of the difficulty or danger to be *guarded* against; nor if the injury was caused by the fault of the employee in taking unnecessary risks, or in failing to heed warnings or instructions, especially when given by his superiors whose duty it is to do so; nor by voluntarily placing himself unnecessarily in a dangerous position whereby he is injured.
>
> It is alleged that these rules are not applicable to the case at bar, or rather that the case at bar is removed therefrom by the act of Congress, which went into effect a few days prior to this accident, and which prohibits all carriers from hauling or permitting to be hauled on their lines any car used in interstate traffic which is not equipped with the automatic coupler, the eighth section of which provides, "that any employee of such common carrier who may be injured by any locomotive, car, or train in use contrary to the provisions of this act shall not be deemed thereby to have assumed the risk thereby occasioned, although continuing in the employment of such common carrier after the unlawful use of such locomotive, car or train had been brought to his knowledge."
>
> It is urged that this steam shovel was not a "car used in interstate traffic," and therefore, the act of Congress is not applicable thereto. * * *
>
> * * * We are of opinion that this shovel car

was not a car used in interstate commerce or any other kind of traffic. Such was not its purpose nor the use to which it was being put.

But even were the steam shovel, as shown to have been operated or transferred and equipped, construed to come under the provisions of said act, we are of opinion that plaintiff is not entitled to recover, for the reason that her own testimony adduced at the trial showed the decedent to be guilty of negligence that contributed to his death.

True, under said act he was not considered to have assumed the risks of his employment, but by this is certainly meant no more than such risks as he was exposed to thereby, and resulted in injury free from his own negligent act. It would hardly be argued that defendant would be liable, under such circumstances, were the employee to voluntarily inflict an injury upon himself by means of the use of the improperly equipped car. And yet it is but a step from contributory negligence to such an act.

We think the true position to be, that the employee is placed in the position that he would be, in case he were furnished with a defective appliance, which fact is known to his employer but not, either actually or constructively, to the employee. In such a case the employee has not assumed the said risk incident to his employment, and yet we trust it would not be seriously contended that such an employee might recover for an injury to which his own negligence had contributed (11, 12).

* * * * * * *

It seems very clear to us that, whatever view we may take of this case, we are led to the legal conclusion that decedent was guilty of negligence that contributed to his death, and that the plaintiff, however deserving she may be, or however much we regret the unfortunate accident, cannot recover (13).

In support of her appeal to the Supreme Court of Pennsylvania, plaintiff assigned the following errors:

1. The holding that "the shovel car was not a car used in interstate commerce or any other kind of traffic."

2. The holding that "contributory negligence will bar a recovery for an injury inflicted by defendant's negligence which results from a failure to comply with statutory requirements" (60).

3. The refusal to submit the question of contributory negligence to the jury.

The Supreme Court of Pennsylvania affirmed the judgment of the trial court in a *per curiam* opinion, saying:

> Whether the act of Congress in regard to the use of automatic couplings on cars employed in interstate commerce, has any applicability at all in actions for negligence in the courts of Pennsylvania, is a question that does not arise in this case, and we therefore express no opinion upon it. The learned judge below sustained the nonsuit on the ground of the deceased's contributory negligence and the judgment is affirmed on his opinion on that subject (56).

To reverse this judgment the case has been brought into this court by a writ of error, and the errors assigned are substantially those which were assigned for argument before the Supreme Court of the State (59).

> Whether a right or privilege, claimed under the Constitution or laws of the United States, was distinctly and sufficiently pleaded and brought to the notice of a State court, is itself a Federal question, in the decision of which this court, on writ of error, is not concluded by the view taken by the highest court of the State.
>
> Carter *v.* Texas, 177 U. S., 442, 447, citing Neal *v.* Delaware, 103 U. S., 370, 396-397; Mitchell *v.* Clark, 110 U. S., 633, 645; Boyd *v.* Thayer, 143 U. S., 135, 180.

So, where in this court a party asserts that the final judgment of the highest court of a State denied to him a right

or immunity set up and claimed under the Constitution or laws of the United States, if upon examining the record this court can find that a Federal question was properly raised or that a Federal right or immunity was specially claimed in the trial court, then jurisdiction to review the judgment of such State court will not have been defeated by the mere failure of the highest court of the State to dispose of the question so raised or to pass upon the right or immunity so claimed.

Erie Railroad Co. *v.* Purdy, 185 U. S., 148, 154.

Section 2 of the act of Congress of March 2, 1893, "To promote the safety of employees and travelers upon railroads," &c. (27 Stats. L., 531), made it unlawful for any common carrier engaged in interstate commerce by railroad "to haul or permit to be hauled or used on its line any car used in moving interstate traffic not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars."

Section 8 of said act declared—

> That any employee of any such common carrier who may be injured by any locomotive, car, or train in use contrary to the provision of this act shall not be deemed thereby to have assumed the risk thereby occasioned, although continuing in the employ of such carrier after the unlawful use of such locomotive, car, or train had been brought to his knowledge.

The act of Congress of March 2, 1903, "To amend an act entitled 'An act to promote the safety of employees and travelers upon railroads," &c., approved March 2, 1893 (32 Stats. L., 943), declares that the provisions and requirements of said act of March 2, 1893—

> shall apply in all cases, whether or not the couplers brought together are of the same kind, make, or type; and the provisions and requirements hereof and of said acts relating to train brakes, automatic couplers, grab-

> irons, and the height of drawbars shall be held to apply to all trains, locomotives, tenders, cars, and similar vehicles used on any railroad engaged in interstate commerce, * * * and to all other locomotives, tenders, cars, and similar vehicles used in connection therewith.

In the case of Johnson *v.* Southern Pacific Company (196 U. S., 1) this court, referring to the provisions of section 3 of said Act of 1903, which section declared that—

> "Nothing in this act shall be held or construed to relieve any common carrier * * * from any of the provisions, powers, duties, liabilities, or requirements of said Act of March second, eighteen hundred and ninety-three, as amended," &c.,

said:

> "As we have no doubt of the meaning of the prior law, the subsequent legislation cannot be regarded as intended to operate to destroy it. Indeed, the latter act is affirmative, and declaratory, and, in effect, only construed and applied the former act. * * * This legislative recognition of the scope of the prior law fortifies and does not weaken the conclusion at which we have arrived."

In that case this court also declared that—

> "Manifestly the word 'car' was used in its generic sense. There is nothing to indicate that any particular kind of car was meant. Tested by context, subject-matter and object, 'any car' meant all kinds of cars running on the rails, including locomotives." * * * "We think that what the act plainly forbade was the use of cars which could not be coupled together automatically by impact, by means of the couplers actually used on the cars to be coupled. The object was to protect the lives and limbs of railroad employees by rendering it unnecessary for a man operating the couplers to go between the ends of the cars, and that object would be defeated, not necessarily by the use of automatic couplers of different

> kinds, but if those different kinds would not automatically couple with each other. The point was that the railroad companies should be compelled, respectively, to adopt devices, whatever they were, which would act so far uniformly as to eliminate the danger consequent on men going between the cars."

Replying to the objection of counsel, that the character of the dining car whose improper equipment caused the damages under consideration in that case, at the time and place of the injury, was local only and could not be changed until the car was actually engaged in interstate movement or being put into a train for such use, the court said:

> "Whether cars are empty or loaded, the danger to employees is practically the same, and we agree with the observation of District Judge Shiras in Voelker *v.* Railway Company, 116 Fed. Rep., 867, that 'it cannot be true that on the eastern trip the provisions of the Act of Congress would be binding upon the company, because the cars were loaded, but would not be binding upon the return trip, because the cars are empty.'
>
> "Confessedly, this dining car was under the control of Congress while in the act of making its interstate journey, and in our judgment it was equally so when waiting for the train to be made up for the next trip."

That the plaintiff intended to set up and claim, and did in fact at the proper time and in the proper manner claim, a "right, privilege, or immunity" under a statute of the United States, cannot well be questioned. That the decision of the trial court is against the right, privilege, or immunity so specially claimed is equally clear. The denial by the trial court of the federal right, privilege, or immunity so claimed is perpetuated by the decision of the State supreme court, although, in announcing its judgment of affirmance, that court professed not to have considered the federal question at all, and based its decision upon a supposedly non-federal

ground, *i. e.*, the alleged contributory negligence of the deceased.

The plaintiff in error here contends that the federal right, privilege, or immunity claimed by her, and denied by the decisions of the State courts, is inextricably interwoven with the supposed defense of contributory negligence on the part of the deceased, and that the application of the provisions of the federal statute invoked by plaintiff to the facts disclosed in evidence was the sole matter for adjudication before the State courts. The proper disposition of the questions so raised would have been decisive of the whole case.

Paraphrasing the language which this honorable court used in the case of Anderson *v.* Carkins, 135 U. S., 483, it is immaterial that the State courts considered the case to fall within the principles of general common law untrammeled by statutory enactments. "The grasp of the federal statute must first be released. The construction and scope of that are federal questions in respect to which the party who claims under such statute, and whose claim is denied, has a right to invoke the judgment of this court."

A case arises under the Constitution or a law of the United States whenever its correct decision depends upon the construction of either.

Cohens *v.* Virginia, 6 Wheaton, 375.

Also whenever the rights set up by a party may be defeated by one construction or sustained by another.

Osborne *v.* Bank of United States, 9 Wheaton, 738.
Starin *v.* New York, 115 U. S., 248.

The jurisdiction of this court extends to every right protected by the laws of the United States, irrespective of the source whence such rights may spring.

New Orleans *v.* De Armas, 9 Peters, 224.

And the refusal of a State supreme court to consider a federal question which is controlling in a case is equivalent

to a decision against the federal right involved therein, and gives to this court jurisdiction to review its judgment.

Des Moines Nav., &c., Co. *v.* Iowa Homestead Co., 123 U. S., 552.

Phoenix Bank *v.* Risley, 111 U. S., 125.

While it is conceded that this court cannot enter upon the inquiry as to whether the finding of a jury in a State court is against the evidence,

Missouri, Kansas & Topeka R. R. Co. *v.* Haber, 169 U. S., 639,

nevertheless the question as to the sufficiency, competency, or legal effect of the evidence as bearing upon a question of federal law raised in the course of the trial, may be reviewed by this court as a supreme court of error of a State may review the proceedings of inferior courts of original jurisdiction.

Mackey *v.* Dillon, 4 Howard, 447.

Dower *v.* Richards, 151 U. S., 658.

Though it should be conceded that in the absence of any question as to the construction and application of the federal safety appliance law the defense of contributory negligence gives rise to questions of general law merely, which are finally determinable by the decision of the State court (Texas, &c., R. R. Co. *v.* Johnson, 151 U. S., 81, 98), still where, as here, contributory negligence as matter of defense is found and declared as matter of law by the State courts, and the plaintiff's right to immunity from the burdens of such defense set up under the provisions of a federal statute are by such declaration, in effect, if not in fact, denied, this court has jurisdiction to consider and determine for itself whether, under the provisions of the federal statute specifically invoked, the defense of contributory negligence is available to a defendant who had violated its express prohibitions, and, if so, then whether the evidence upon which such defense rested was of such a character as justified the

trial court in peremptorily instructing the jury to return their verdict against the damaged plaintiff.

The question as to the effect of contributory negligence as a defense in actions for damages arising out of a violation by an interstate carrier of the prohibitions of the Act of March 2, 1893, as amended was raised in the case of Johnson *v.* Southern Pacific Co., *ubi supra,* and was left open by this court as follows:

> "Finally, it is argued that Johnson was guilty of such contributory negligence as to defeat recovery, and that, therefore, the judgment should be affirmed. But the circuit court of appeals did not consider this question, nor apparently did the circuit court, and we do not feel constrained to inquire whether it could have been open under § 8, or, if so, whether it should have been left to the jury under proper instructions."

If the defense of contributory negligence was open at all, the evidence in the case at bar upon that point was of such character as required at least that it should have been submitted to the jury for its consideration.

The extended discussion of the merits of each of these suggestions follows in appropriate order hereafter.

ASSIGNMENTS OF ERROR.

1. It was error to hold that "the shovel car was not a car used in interstate commerce or any other kind of traffic."

2. It was error to hold that "plaintiff's decedent was guilty of negligence which contributed to his death."

3. It was error to hold as matter of law that the alleged contributory negligence of deceased barred any recovery for damages resulting from defendant's negligence in failing or refusing to comply with the plain requirements of the United States laws.

4. If, under the circumstances of this case contributory

negligence was admissible at all by way of defense, then the refusal of the trial court to submit that question to the jury, and its further refusal to set aside the compulsory nonsuit entered in the cause constitute reversible error.

ARGUMENT.

It is the contention of the plaintiff in error that the so-called shovel car, which the deceased in the performance of his duty as a brakeman in the employ of defendant in error was endeavoring to couple up to the caboose, was a "car" within the purview of section 2 of the Act of March 2, 1893; that by the provisions of section 8 of said act deceased was granted immunity from the common law doctrine of assumed risks, in so far as any injury received by him while making such coupling was concerned, and that the existence of contributory negligence as a defense in such a case ought not and cannot reasonably be inferred from or predicated upon the mere occurrence of injury, there being no evidence that deceased recklessly, wantonly, or unnecessarily exposed himself to an obvious danger.

I.

The trial court erred in holding that "the shovel car was not a car used in interstate commerce or any other kind of traffic."

Section 2 of the act of March 2, 1893, commonly known as the Safety Appliance Act, provides:

> That on and after the first day of January, eighteen hundred and ninety-eight, it shall be unlawful for any such common carrier to haul or permit to be hauled or used on its line any car used in moving interstate traffic not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars.

In the case of Johnson *v.* Southern Pac. Co., 196 U. S., 1, this court held that the phrase "without the necessity of men going between the cars" applied both to the act of coupling and uncoupling, and further held that the coupler must couple with all other makes as well as with those of its own kind. We take it that there is no question that this shovel car was not equipped with couplers coupling automatically by impact, which could be uncoupled without the necessity of men going between the ends of the cars. In the present case there could be no coupling or uncoupling without the presence of a man between the shovel car and the car to which it was to be attached.

The fifth section of the original Safety Appliance Act provided:

> That within ninety days from the passage of this act the American Railway Association is authorized hereby to designate to the Interstate Commerce Commission the standard height of drawbars for freight cars, measured perpendicular from the level of the tops of the rails to the centers of the drawbars, for each of the several gauges of railroads in use in the United States, and shall fix a maximum variation from such standard height to be allowed between the drawbars of empty and loaded cars. Upon their determination being certified to the Interstate Commerce Commission, said Commission shall at once give notice of the standard fixed upon to all common carriers, owners, or lessees engaged in interstate commerce in the United States, by such means as the Commission may deem proper. But should said association fail to determine a standard as above provided, it shall be the duty of the Interstate Commerce Commission to do so, before July first, eighteen hundred and ninety-four, and immediately to give notice thereof as aforesaid. And after July first, eighteen hundred and ninety-five, no cars, either loaded or unloaded, shall be used in interstate traffic which do not comply with the standard above provided for.

In accordance with the provisions of this section, the standard height of drawbars for standard-gauge cars was fixed at

34½ inches, with a maximum variation of three inches between loaded and empty cars. This shovel car was standard gauge—that is, 4 feet 8½ inches wide between the rails—but instead of the drawbar being 34½ inches, or 31½ inches if it was a loaded car, the drawbar hung down to within 27 inches from the level of the tops of the rails, so that it was below the standard height at least 4½ inches. It is plain that the drawbar of this car in the matter of height above the tops of the rails did not meet the requirements of the statutes.

Although this act of Congress was approved on March 2, 1893, it did not go into effect until January 1, 1898. By its provisions the Interstate Commerce Commission was authorized, from time to time, after full hearing and for good cause, to extend the period within which any common carrier shall comply with the provisions of the act. Under this clause the railroads obtained, as to the second section, two extensions of time, amounting in the aggregate to two years and seven months, so that this section became effective in practice August 1, 1900 (8 I. C. C., 643 and 662). As to the fifth section, an extension of time amounting to seven and one-half months, or from July 1, 1895, to February 15, 1896, was granted by the Commission on application of carriers subject to the act (6 I. C. C., 332).

Employees engaged in the movement of interstate traffic are engaged in one of the most hazardous occupations. Thus every year thousands lose their lives and many more thousands have suffered serious bodily injury. It was to remedy the conditions of employment that Congress passed the original Safety Appliance Act and its amendments. The intention of Congress, declared in the preamble and in the act, was "to promote the safety of employees and travelers upon railroads by compelling common carriers engaged in interstate commerce to equip their cars with automatic couplers and continuous brakes and their locomotives with driving-wheel brakes," whereby the danger and risks con-

sequent upon the existing system might be reduced as far as possible. In the Johnson case, *supra,* this court held that the primary object of this act was to promote the public welfare by securing the safety of employees and travelers, and in that aspect it was remedial; and that although for violation of the act there was provided a penalty of one hundred dollars, recoverable in a civil action, the design to give relief was more dominant than to inflict punishment, and for that reason absolute strictness of construction should not be applied, but such construction should be given as would accomplish the intent of Congress.

The first question to be answered is, Was this shovel car a car within the meaning of the act?

In a number of States, construing the employers' liability acts, it has been held by the courts that the word "car" will include a locomotive, a tender, a hand car, or a push car as well as the ordinary freight car or passenger car. In the case of Kansas City, M. & B. R. Co. *v.* Crocker, 11 So., 262, 95 Ala., 412, the definitions given in the Century Dictionary that a car is a vehicle "running upon rails" and in Webster's Dictionary, that a car is "a vehicle adapted to the rails of a railroad" were accepted as being correct. In the case of Thomas *v.* Georgia R. & Banking Co., 38 Ga., 222, 224, it was held that a hand car as well as a steam car was included within the provision of the code, rendering railroad companies liable for injuries done in the running of cars.

A Texas statute provides that a railroad corporation shall be liable for all damages sustained by any employee while engaged in "operating cars" by reason of the negligence of any other employee. In discussing the meaning of the word "car" in this statute, the court held that the word signified any vehicle adapted to the rails of a railroad and would embrace a hand car as well as freight or passenger car (Perez *v.* San Antonio & A. P. Ry. Co., 678 S. W., 137; 28 Tex. Civ. App., 255). It has also been held under the same statute that a push car 8 or 10 feet long and 3 or 4 feet high, used for

transporting rocks down an inclined plane to a rock-crusher, is a "car" within the meaning of the act (Texas & P. R. Co. *v.* Webb, 72 S. W., 1044; 31 Tex. Civ. App., 498).

The correctness of such conclusions is guaranteed by the decision of this court in Johnson *v.* Southern Pac. Co., from which we venture to repeat an extract heretofore quoted:

> And manifestly the word "car" was used in its generic sense. There is nothing to indicate that any particular kind of car was meant. Tested by context, subject-matter and object, "any car" meant all kinds of cars running on the rails, including locomotives. And this view is supported by the dictionary definitions and by many judicial decisions, some of them having been rendered in the construction of this act. (Cases cited.)

It would seem to be sufficiently established that a "shovel car" is a car within the meaning of the act, but it remains to be seen whether as such it was subject to the requirements of the act.

From an examination of sections 2 and 5 of the act it will be seen that the application of the statute is varied as to the use of the car. In the former section the "car" must be used in *moving* interstate traffic; in the latter it need only be *used* in interstate traffic. In order to be subject to the act, the "car" need only be used in interstate traffic, and it does not have to be used in the movement of interstate traffic; but this is a technical and not a real distinction. What the statute was intended to inhibit was the use of any car in an interstate train which did not comply with the statute.

Bouvier's Law Dictionary defines "traffic" as commerce or trade. The Century Dictionary, among other definitions, gives the following:

2. The coming and going of persons or the transportation of goods along a line of travel, as on a road, railway, canal, or steamship route.
3. The persons or goods, collectively, passing or carried along a route or routes.
4. Dealings; intercourse.

English's Law Dictionary defines "traffic" to be "The business of transporting persons, animals, or goods."

Section 1 of the English Railway and Canal Act of 1884 defines the word "traffic" as used in that act as follows:

> "Traffic" includes not only passengers and their luggage and goods, animals and other things conveyed by any railway company or canal company or railway and canal company, but also carriages, wagons, trucks, boats and vehicles of every description adapted for running or passing on the railway or canal of any such company.

A great many writers of text books, and we may add of judicial decisions, used the word "traffic" interchangeably with the word "commerce." An examination of the language of the act under discussion shows such use on the part of Congress. The preamble uses the word "commerce." In the first section "commerce" is used once and "traffic" twice. Section 2 uses the word "traffic." Sections 2 and 4 use the word "commerce." Section 5 uses the words "commerce" and "traffic" once each.

We think it quite evident that in this act Congress intended to use the two words synonymously and to avoid repetition. This court has well settled the meaning of the word "commerce" as used in the "commerce clause" of the Constitution. While some decisions make "commerce" of a broader import than the word "traffic," still, running through these decisions the words are used interchangeably. We cite a few cases showing that "traffic" as well as "commerce" covers the transportation of persons and property, and that the words "interstate traffic" cover all transportation of persons and property where such transportation crosses State lines.

In Gibbons *v.* Ogden, 9 Wheat., 1, Chief Justice Marshall defined "commerce" as follows:

> Commerce, undoubtedly, is traffic, but it is something more; it is intercourse. It describes the commercial intercourse between nations, and parts of nations, in all its branches, and is regulated by prescribing rules for carrying on that intercourse (page 189).

Mr. Justice Johnson, in his concurring opinion in the same case, at page 229, says:

> Commerce, in its simplest signification, means an exchange of goods; but in the advancement of society, labor, transportation, intelligence, care, and various mediums of exchange, become commodities, and enter into commerce; the subject, the *vehicle*, the agent, and the various operations, become the objects of commercial regulation.

In the case of County of Mobile *v.* Kimball, 102 U. S., 702, this court said:

> Commerce with foreign countries and among the States, strictly considered, consists in intercourse and traffic, including in these terms navigation and the transportation and transit of persons and property, as well as the purchase, sale and exchange of commodities. For the regulation of commerce as thus defined there can be only one system of rules applicable alike to the whole country; and the authority which can act for the whole country can alone adopt such a system.

In the case of Gloucester Ferry Co. *v.* Pennsylvania, 114 U. S., 196, 204, we find this expression:

> It needs no argument to show that the commerce with foreign nations and between the States, which consists in the transportation of persons and property between them, is a subject of national character and requires uniformity of regulation.

In the Lottery Case, 188 U. S., 321, on page 345, in discussing the import of the word "commerce," the court, after reviewing prior decisions, said:

> What is the import of the word "commerce" as used in the Constitution? It is not defined by that instrument. Undoubtedly, the carrying from one State to another by independent carriers of things or commodities that are ordinarily subjects of traffic, and which have in themselves a recognized value in money, constitutes interstate commerce. But does not commerce among the several States include something more? Does not the carrying from one State to another, by independent carriers, of lottery tickets that entitles the holder to the payment of a certain amount of money therein specified also constitute commerce among the States? * * *
>
> They show that commerce among the States embraces navigation, communication, traffic, the transit of persons, and the transmission of messages by telegraph. They also show that the power to regulate commerce among the several States is vested in Congress as absolutely as it would be in a single government, having in its Constitution the same restrictions on the exercise of the power as are found in the Constitution of the United States; that such power is plenary, complete in itself, and may be exerted by Congress to its utmost extent, subject *only* to such limitations as the Constitution imposes upon the exercise of the powers granted by it; and that in determining the character of the regulation to be adopted Congress has a large discretion, which is not to be controlled by the courts simply because, in their opinion, such regulations may not be the best or most effective that could be employed.

On page 354 the court further said:

> We are of opinion that lottery tickets are subjects of traffic and therefore are subjects of commerce, and the regulation of the carriage of such tickets from State to State, at least by independent carriers, is a regulation of commerce among the several States.

What was the nature of the service being performed by the defendant at the time plaintiff's decedent was injured? From the record it is evident that the shovel car was being transported as freight; and while hauling this construction train, of which the shovel car was a part, the defendant did not cease to be a common carrier (Peoria & Pekin Un. Ry. Co. *v.* C., R. I. & P. Ry. Co., 109 Ill., 135).

It may be insisted that this shovel car was not used in moving interstate traffic, as it was traffic itself; but such a construction of the act would not be in line with the decisions of this court to the effect that such construction shall be given as will accomplish the intent of Congress.

The defendant in error at the time of the accident to Schlemmer was performing a transportation service simply. So far as the statutory duty of defendant in error was concerned, the fact that the steam shovel was bolted to a platform carried on trucks does not affect the nature of the services rendered. Whether the steam shovel was simply set upon or was bolted to and made a part of the platform of the car does not affect the dangers incident to the use of the coupling appliances nor affect the character of the service rendered by the carrier. Congress intended to obviate the very danger which was here necessarily incurred by plaintiff's decedent. The purpose for which the machine was to be used makes no difference, so far as the defendant in error and its employees were concerned. It was in fact a car carrying a load which was being moved from a point in one State to a point in another.

We therefore submit that this shovel car was a car used in interstate traffic, and hence subject to all the requirements of the Safety Appliance Act.

II.

IT WAS ERROR TO HOLD AS MATTER OF LAW THAT THE ALLEGED CONTRIBUTORY NEGLIGENCE OF DECEASED BARRED PLAINTIFF'S RIGHT TO RECOVER DAMAGES GROWING OUT OF DEFENDANT'S NEGLIGENCE IN FAILING OR REFUSING TO COMPLY WITH THE PLAIN REQUIREMENTS OF THE UNITED STATES LAWS.

In discussing this assignment of error we shall confine our argument entirely to the Safety Appliance Act, especially section 8 thereof, which reads as follows:

> That an employee of any such common carrier who may be injured by any locomotive, car, or train in use contrary to the provision of this act shall not be deemed thereby to have assumed the risk thereby occasioned, although continuing in the employement of such carrier after the unlawful use of such locomotive, car, or train had been brought to his knowledge.

In construing this section it is necessary to ascertain, if that can be done, what the Congress had in mind when enacting the statute. It is plain that it was primarily the intention of the Congress by this provision to relieve employees of common carriers from the stringent rules of the common law governing defenses in actions for damages between servants and master. Secondarily, by removing from the carrier's reach a greatly favored method of defense in such cases it hoped to at least induce, if not compel, the carriers to a prompt and strict compliance with the requirements of the same law as to the equipment of its cars.

The intention was to render the company at least *prima facie* liable to respond in damages in every case where an employee engaged in handling improperly or defectively equipped cars received an injury. By abolishing the de-

fenses incident to the relation of employer and employee it was intended to make it to the greater interest of the carrier to equip its cars as required by law.

As was said by Caldwell, J.:

> Whenever it is made to appear to a railroad company that it costs more to pay the damages assessed against it by the verdicts of juries for maintaining a dangerous condition of its track or appliances than it would cost to substitute safe ones in their place, the substitution is quickly made. But as long as courts hold as matter of law that what the witnesses in this case declare to be "simply a death-trap" may be maintained with impunity and without incurring any pecuniary liability, the death-trap will remain and the slaughter go on.

So that, in its desire to protect trainmen, Congress took this additional means to enforce compliance with the law.

At Limestone, in the State of New York, the defendant is approached by a shipper anxious to have this shovel car conveyed to Crenshaw, in the State of Pennsylvania. The defendant sees the condition of the car and notices, or should have noticed, its equipment, so far as safety appliances are concerned. Now, before accepting this car and moving it on its line, it was the defendant's duty, arising from the statute, to inspect the couplers and see that they were in good condition—that they were reasonably safe appliances—in order that the safety of its employees might not be endangered.

In Railroad Co. *v.* Mackey, 157 U. S., 72, Mr. Justice Harlan said:

> We are of the opinion that sound reasoning and public policy concur in sustaining the principle that a railroad company is under a legal duty not to expose its employees to dangers arising from such defects in foreign cars as may be discovered by reasonable inspection before such cars are admitted into its train.

In the case of this shovel car the slightest inspection would have shown that the coupling did not comply with the requirements of the statutes or the general law requiring reasonably safe appliances. Under our construction of the law, and we believe it is sustained by the decisions of this court and by those of numerous other courts, as well as by text-writers, the receipt of this car by the defendant in an unlawful condition was gross or willful negligence.

In the case of Shumacher *v.* St. Louis & S. F. R. Co., 39 F. R., 174, the court said:

> A party is guilty of gross negligence if he fails to exercise the care required of him by the law. This care required by the law is such care as is necessary under the circumstances to secure the protection of the lives, persons, and property of other persons.
>
> Gross negligence is the absence of the care necessary under the circumstances to secure protection to life, person, and property. The entire absence of that prudent and proper care necessary to render safe life, person and property, and the failure to exercise such care shows a conscious indifference to consequences which makes a state of case in which there is constructive or legal willfulness.
>
> In a case where, as a probable consequence, the danger is very great, the greater the degree of care required. In such a case the law requires the very highest possible care to prevent an injury.
>
> An act characterized by a high degree of negligence, or, as is familiarly called, "gross negligence," is the counterpart of a willful act. When the danger is great, and the care to prevent disaster is very slight, or none at all, the neglect of a party becomes a willful act in law.
>
> The highest duty of a man is to protect human life, or the person of a human being. That duty is never performed so as to escape responsibility until all possible care, under the circumstances, has been exercised.

In the case of Railroad Co. *v.* Lockwood, 17 Wall., 382, this court defined "gross negligence" as the failure to use

slight care when required. In the case of Milwaukee, etc., R. Co. *v.* Arms, 91 U. S., 495, "gross negligence" was said to be a relative term and meant the absence of care necessary under the circumstances. Another citation widely used is this: "Gross negligence" is the want of even slight care and diligence (Louisv. & Nashv. R. Co. *v.* McCoy, 81 Ky., 403, 409; Kiley *v.* Western Un. Tel. Co., 267 N. Y. Supp., 532, 535).

In Bannon *v.* B & O. R. Co., 24 Md., 108, 124, the court defined "gross negligence" as the omission of that care which even inattentive and thoughtless men never fail to take of their own property. It is a violation of good faith.

In the case of Schindler *v.* Milwaukee, etc., R. Co., 87 Mich., 400, the court said that "gross negligence" is the intentional failure to perform a manifest duty, in the reckless disregard of the consequences, as affecting the life or property of another, or a thoughtless disregard of consequences without any attempt to avoid them.

In the case of United States *v.* Southern Ry., 134 Fed. Rep., in construing the Safety Appliance law, referring to the fact that an "M. C. B. defect card" had been placed on certain cars having defective safety appliances, the card being notice to all connecting lines that the defendant had sent the car out defective, and that other lines using the car would not have to account to defendant for the particular injury or defect noted on the card, Judge Humphrey said:

> Here is such deliberate violation of the statute as to amount to defiance of the law.

So we think the courts in their construction of "gross negligence" have given the term such a meaning as will permit its application to the facts in this case, wherein the defendant accepted and transported this shovel car knowing full well that it did not comply in any degree with the requirements of the statute, and that it would be absolutely necessary for its employees to handle such car in coupling

and uncoupling, thereby adding to their already grave dangers of injury.

It has been held by some State courts, in construing safety-appliance laws, that contributory negligence cannot be pleaded as a bar to recovery by a plaintiff when the proximate cause of plaintiff's injury was the failure of defendant to comply with a statute (Carterville Coal Co. *v.* Abbott, 181 Ill., 495; Kansas City, Memphis & Birmingham R. R. *v.* Flippo, 138 Ala., 487).

The proximate cause of the accident in this case was the failure to have couplers coupling automatically by impact, and which could be uncoupled without the necessity of men going between the ends of the cars. Had there been on this shovel car automatic couplers, Schlemmer would not have been compelled to go between the cars and he could not have suffered the injury he received. This court in 191 U. S., 334, in the case of Railroad Co. *v.* Holloway, held that the neglect of the carrier to furnish brakes upon the engine was *prima facie* evidence of negligence. In that case a horse had gotten upon a trestle, and the failure to have brakes rendered it impossible to stop the locomotive in time to prevent a collision with the horse, by reason of which collision the plaintiff was severely injured. We quote from that opinion:

> The purpose of the brake is to stop the engine more promptly than can be done without it, and if there had been a brake on the engine it would, if used, have probably prevented the accident. At any rate, there was evidence to that effect. The absence of a brake which, if present, would have prevented the accident was, therefore, a proximate cause thereof.

In the case of Elmore *v.* Seaboard Air Line Ry. Co., 41 S. E., 786, Mr. Justice Clark, after citing Greenlee *v.* Ry. Co., 122 N. C., 977, and Troxler *v.* R. Co., 124 N. C., 191, said:

> This proposition is settled in the cases above cited, to wit, it is the duty of the defendant to use automatic

> couplers, and if, on failure so to do, injury occurs to an employee, which would not have happened if there had been a coupler, this is a continuing negligence on the part of the employer, which cuts off the defense of contributory negligence, such failure being the *causa causans.*

The same court, in the case of Fleming *v.* Southern Ry. Co., 131 N. C., 476, had before it a case brought by a brakeman who had been injured in handling a drawbar similar to the one in this case, excepting that it was 40 pounds heavier and 2 feet longer. In referring to the failure of the carrier to comply with the law in that case, the court said:

> There can then be no contributory negligence of the plaintiff available to the defendant as a defense in this action, because the plaintiff attempted to make the coupling in discharge of his duty, and because the continuing negligence of the defendant up to the moment of the injury was subsequent to the plaintiff's negligence, if there was any, and is the proximate cause of the injury.

In the case of the Union Pac. Ry. Co. *v.* McDonald, 152 U. S., 262, this court held that the company was guilty of negligence because it had not complied with the statute requiring owners of coal mines to fence their slack piles and abandoned pits. We quote from that opinion:

> The only question that could arise in this part of the case is whether the court should have instructed the jury—as, in effect, it did—that the failure of the company to put a fence around the slack pit, as required by the statute of Colorado, was negligence, of which the plaintiff could complain in this action for personal injuries sustained by him. Primarily, that statute was intended for the protection of cattle and horses. But it was not, for that reason, wholly inapplicable to the present case upon the issue as to negligence. In Hayes *v.* Michigan Central Railroad, 111 U. S., 228, 240, which was an action by an in-

fant for personal injuries sustained by the alleged negligence of a railroad company in not properly guarding its line within the limits of Chicago, this court speaking by Mr. Justice Matthews, said: "In the analogous case of fences required by the statutes, as a protection for animals, an action is given to the owners for the loss caused by the breach of the duty. And although in the case of injury to persons by reason of the same default, the failure to fence is not, as in the case of animals, conclusive of the liability, irrespective of negligence, yet an action will lie for the personal injury, and this breach of duty will be evidence of negligence. The duty is due, not to the city as a municipal body, but to the public, considered as composed of individual persons; and each person specially injured by the breach of the obligation is entitled to his individual compensation, and to an action for its recovery." The non-performance of the railroad company of the duty imposed by statute, of putting a fence around its slack pit, was a breach of its duty to the public, and, therefore, evidence of negligence, for which it was liable in this case, if the injuries in question were, in a substantial sense, the result of such violation of duty.

In the case of *The Pennsylvania*, 19 Wall., 125, this court held that if it clearly appears that the fault committed by a vessel has nothing to do with the disaster which has occurred, the liability for damages is against the vessel alone which has produced the disaster; still, where a vessel has committed a positive breach of statute she must show not only that probably her fault did not contribute to the disaster, but that certainly it did not, and that the damages in that case were to be equally divided between the two vessels, as they were both in fault, the steamer in moving at so rapid a rate in so dense a fog in such a place, the brig for her violation of the act of Congress in using a bell instead of a fog-horn.

Mr. Justice Cooley, in the case of Flint, etc., R. Co. *v.* Lull, 28 Mich., 510, 515, in discussing the reasons for his holding that contributory negligence would not bar a re-

covery from a defendant which had violated a statute, used words which are entirely applicable to the present case, saying:

> Indeed, if contributory negligence could constitute a defense, the purpose of the statute (requiring railroad companies to fence right of way) might be in a great measure, if not wholly, defeated; for the mere neglect of the railroad company to observe the directions of the statute would render it unsafe for the owner of beasts to suffer them to be at large, or even on his own grounds in the vicinity of the road; so that if he did what, but for the neglect of the company, it would be entirely safe and proper for him to do, the very neglect of the company would constitute its protection, since that neglect alone rendered the conduct of the plaintiff negligent.

We are not unmindful of the fact that in a number of cases it has been held that although the violation of a statute is negligence *per se*, yet contributory negligence on the part of the plaintiff will nevertheless bar a recovery; but such conclusion is not founded on right, justice, or humanity. The business of transporting commerce over the railroads of the country is one of the most hazardous in which men can be engaged and this court has said in Mather *v.* Rillston, 156 U. S., 399, that in occupations attended with great danger, it is the master's duty to furnish all appliances readily attainable known to science for the prevention of accidents.

The law specifically provides that the employee shall not be deemed to have assumed the risk of handling defective cars, but the law can never prevent the employee from being subjected to the danger of bodily harm so long as it permits the employee to handle a car defectively equipped.

The employee must either go between the cars and use the defective appliance or else the entire transportation service of the carrier must be obstructed. Such a condition would endanger not only the train hauled, but the trains coming

from either direction, and would bring about a condition simply intolerable. The employee, recognizing his duty in the premises, does go in at the risk of danger to himself and performs the duty the best way he can with the appliances placed at his disposal by the carrier.

So long as it is not unlawful for him to attempt the coupling he will undertake it, although in so doing he is in imminent peril of losing life or limb.

We submit that it should be the uniform law of this country, so far as this court can make it, that no carrier upon being sued for damages occasioned by its violation of the statute should be permitted to say to the plaintiff, its employee, we do not have to recompense you for your pain and suffering because you did not use the extraordinary care to avoid injury which the dangerous character of the coupling device at hand made necessary. The lawbreaker should not be permitted to plead the lack of care on the part of its employee to defeat the demand for compensation for damages primarily due to its own lawless act.

III AND IV.

THE COURT ERRED IN NOT SUBMITTING THE QUESTION OF CONTRIBUTORY NEGLIGENCE TO THE JURY.

From the evidence, it clearly appears that Schlemmer was an experienced employee, who had served for several years as head and middle brakeman, and that, as far as the ordinary routine work of the railroad was concerned, Schlemmer was a capable man.

It does, however, appear from the record that the hauling of a shovel car was a very infrequent occurrence. If Schlemmer's experience was similar to that of Mr. Coates, the yard conductor, and similar to those of the witnesses in this case, he had handled but few, if any, shovel cars. Mr. Coates, who had been in service 15 years (Record, p. 15), "had seen

but few" (Record, p. 22). Mr. Gensaner, brakeman, who had been in service 15 years (Record, p. 24), testified that this was the only shovel car that he had ever handled or helped to handle (Record, p. 26). Mr. Neilson, freight conductor, who had been in the service 10 years (Record, p. 28), testified that this was the only shovel car that he had ever handled (Record, p. 39). If any inference, so far as the plaintiff's decedent is concerned, can be drawn from this evidence, it is that the coupling and uncoupling of this shovel car to the caboose was new work to him.

To hold Schlemmer guilty of contributory negligence is to find that in performing his duty in coupling this shovel car to the caboose, he failed to exercise such care for his personal safety as the circumstances demanded; that he did some act which an ordinarily prudent man would not have done under the circumstances. Now, let us see what the witnesses in this case testified to with reference to the acts of plaintiff's decedent in attempting to make the required coupling.

COATES, yard conductor (Record, p. 17, 18):

> I told Mr. Schlemmer to keep down. He had got down, but raised his head up, and I hollered again. And I seen he was going to get pinched, and I turn my head away; and as soon as the cars parted enough to get through, I got between the car and the caboose and helped pick the man up.
>
> * * * * * * *
>
> Q. After that what did you do? What caused this accident? What happened when he went to couple there?
>
> A. Well he got his head too high.
>
> Q. Well, did he make the coupling?
>
> A. No, he didn't make the coupling. He missed it.
>
> Q. He missed it?
>
> A. Yes, sir.

Page 19:

Q. How did he miss it?

A. When he raised the drawbar up in that drawhead to the patent coupler the drawbar slipped by the drawhead.

Q. And the caboose and the end of the shovel car came together.

A. Came together; yes, sir.

Cross-examination:

Q. When you called to him, directing him to keep down the first time, what reply, if any, did he make?

A. He did not say anything at all.

Q. But he did stoop, did he?

A. Yes.

Q. And the second time you say you called to him to keep down?

A. Yes, but it was too late then.

GENSANER, brakeman, page 30:

Q. And if you kept your head down, there was no danger of injury, was there?

A. If you kept your head down and made the coupling, then there was no danger.

NEILSON, freight conductor, page 40:

Q. Now, when it came to coupling this shovel car to the caboose, tell us what took place that evening.

A. Well, we backed down within about three or four feet of the caboose, and Mr. Schlemmer said he would enter this drawbar in that and drop the pin, and I told him I would set the pin and it would drop itself. I went in and got the pin, and I told him when he went down under the car to take hold of this bar, to be sure and stay down low, so if he missed the coupling he would be in clear so it would not catch him.

* * * * * * *

Page 42:

Q. Mr. Neilson, what time of day did this take place?

A. 8.55.

Q. Had you your lantern there?

A. Yes, sir.

Q. Was it lit?

A. Yes, sir.

Q. Was Mr. Schlemmer's lit?

A. I could not say whether his was lit or not. It more than likely would be.

* * * * * * *

Page 45:

Q. Didn't he try to follow out your instructions?

A. If he had followed the instructions he would not have been hurt.

Q. Didn't he try to follow out your instructions? Didn't he get down there on the ground?

A. Yes, sir.

Q. Didn't he have his lantern there?

A. I could not say whether he had his lantern or not.

Q. Didn't he hold up the big, heavy bar there to the place?

A. He attempted to do it (page 46).

Q. And didn't he try to keep his head down, too?

A. I do not know whether he did or not. I suppose he did.

Q. What part of his head was crushed?

A. The upper part.

Q. His whole head was not crushed?

A. No, sir.

Q. Well, then, he certainly kept down part of his head?

A. Yes, sir.

We do not believe that long citations of authorities are necessary, or that any critical analysis of the testimony is required to show that the court below erred in its holdings set forth in these two assignments. As shown by the record (pages 53 and 54), the defendant's attorney in the trial court moved for a compulsory nonsuit on these two grounds: First, that there is no proof of any negligence on the part of the defendant in this cause; and, second, that the evidence on

behalf of plaintiff proves conclusively that the accident happened because the deceased failed to keep his head at least as low as the floor of the steam shovel; that this omission was the fault of the deceased exclusively; that deceased was guilty of contributory negligence, and that there can be no recovery in this case.

The court sustained the motion for the nonsuit, holding that the question was a matter of law to be decided by the court. The record does not disclose what, if anything, further was said by the trial court at this time; but, in the opinion by the court in refusing to take off the compulsory nonsuit, the court held as a matter of law "that plaintiff's decedent was guilty of negligence that contributed to his death."

Instead of the evidence showing that the deceased had failed to exercise proper care for the safety of his person, we think it is evident that he did nothing which a prudent man would not have done under the circumstances, and that he failed to do nothing which a prudent man would have done. Even if it be true that Schlemmer was told to "look out" for his head, nevertheless the evidence shows that he did take this precaution; the fact that only a part of the top of his head was crushed amply indicates that he was endeavoring to keep his head below the danger point.

The record clearly indicates that the court below erred in holding as matter of law that the deceased was guilty of contributory negligence. The question at least should have gone to the jury. This court has in a number of cases held that where there is any room for doubt the evidence must be submitted to the jury. In one of the earliest cases, Railroad Co. *v.* Stout, 17 Wall., 657, at page 663, Mr. Justice Hunt, in discussing the question as to submission of questions of this kind to the jury, said:

> It is true in many cases that where the facts are undisputed the effect of them is for the judgment of the court and not for the decision of the jury. This is true in that class of cases where the existence of such

facts comes in question rather than where deductions or inferences are to be made from the facts. If a deed be given in evidence, a contract proven, or its breach testified to, the existence of such deed, or breach, there being nothing in derogation of the evidence, is no doubt to be ruled as a question of law. In some cases, too, the necessary inference from the proof is so certain that it may be ruled as a question of law. If a sane man voluntarily throws himself in contact with a passing engine, there being nothing to counteract the effect of this action, it may be ruled as a matter of law that the injury to him resulted from his own fault, and that no action can be sustained by him or his representatives. So if a coach driver intentionally drives within a few inches of a precipice, and an accident happens, negligence may be ruled as a question of law. On the other hand, if he had placed a suitable distance between his coach and the precipice, but by the breaking of a rein or an axle, which could not have been anticipated, an injury occurred, it might be ruled as a question of law that there was no negligence and no liability. But these are extreme cases. The range between them is almost infinite in variety and extent. It is in relation to these intermediate cases that the opposite rule prevails. Upon the facts proven in such cases, it is a matter of judgment and discretion, of sound inference, what is the deduction to be drawn from the undisputed facts. Certain facts we may suppose to be clearly established from which one sensible, impartial man would infer that proper care had not been used, and that negligence existed; another man equally sensible and equally impartial would infer that proper care had been used, and that there was no negligence. It is this class of cases and those akin to it that the law commits to the decision of a jury. Twelve men of the average of the community, comprising men of education and men of little education, men of learning and men whose learning consists only in what they have themselves seen and heard, the merchant, the mechanic, the farmer, the laborer; these sit together, consult, apply their separate experience of the affairs of life to the facts proven, and draw a unanimous conclusion. This average judgment thus given it is the great effort of

the law to obtain. It is assumed that twelve men know more of the common affairs of life than does one man, and they can draw wiser and safer conclusions from admitted facts thus occurring than can a single judge.

In no class of cases can this practical experience be more wisely applied than in that we are considering. We find, accordingly, although not uniform or harmonious, that the authorities justify us in holding in the case before us, that although the facts are undisputed it is for the jury and not for the judge to determine whether proper care was given, or whether they establish negligence.

We have already discussed, under the previous assignment, the question of proximate cause, but attention should be here called to the rule, which is that this question is one to be determined by the jury rather than the court. It is not a question of science or legal knowledge, but is to be determined as a fact, taking in view all the circumstances surrounding the accident. The primary cause may be the proximate cause of the accident, although it may operate through successive instruments, as an article at one end of a chain may be moved by force applied at the other end. The question always is, Was there an unbroken connection between the wrongful act and the injury? Was it a continuous operation?

In the case of Milwaukee & St. Paul Ry. *v.* Kellogg, 4 Otto, 469, at page 475, the court said that in order to warrant a finding that negligence, or an act not amounting to wanton wrong, is the proximate cause of an injury, it must appear that the injury was the natural and probable consequence to have been foreseen in the light of the attending circumstances. So in this case the defendant, not only in view of the duty placed upon it by the general law, but in view of its statutory duty, should have taken such steps as were necessary to prevent the accident that afterwards happened to Schlemmer.

Defendant ought to have foreseen, in the light of the circumstances surrounding train operations, that its employees would have to couple and uncouple the shovel car, and that, as its equipment was dangerous, the risks of operation would be greatly increased. In the case last cited it was held: "The true rule is, what is the proximate cause of an injury is ordinarily a question for the jury." The action of the trial court prevented the jury from passing upon this feature of the case.

In reading the testimony of Coates and Neilson, fellow-employees of Schlemmer, and who are still in the employ of the defendant, one cannot help but be impressed with the—not to say bias, but to put it charitably—reluctance with which these witnesses gave their testimony. How much the more would this have impressed the jury, who could see the witnesses while giving their testimony and determine their credibility. In the case of Texas & Pac. R. Co. *v.* Carlin, 189 U. S., 354-361, this court, in discussing the evidence of the bridge foreman, an employee of the defendant, said:

> The foreman's evidence was that of a somewhat interested witness. If the foreman did in fact neglect to perform his duty by looking over the track just prior to the coming of the train for the purpose of seeing that the bridge was clear of obstructions, it might be quite a serious matter for him in his future relations with the company. At any rate, no man is an absolutely disinterested witness when his testimony relates to the performance or non-performance of a duty which he owed on account of the position he occupied. It was, therefore, a question for the jury as to the measure of credence that should be given to his testimony.

We submit that the same rule should have been applied here and that the measure of credence to be given the evidence should have been left to the jury. The superior officers of the defendant were present at the trial of this case and their very presence could not fail to have its effect adversely

to the interests of the plaintiff in this case. The statement that the coupling on this shovel car was one of the "simplest known" is ample evidence to an unbiased mind that the witnesses were going to an extreme length to save the defendant in this case. It is a well-recognized rule of law that one does not have to accept the evidence of a witness when in one's own judgment it is false.

In the case of Northern Pac. R. R. *v.* Everett, 152 U. S., 107, this court held that the following was an appropriate case for submission to the jury:

> It appears that Everett was a young and inexperienced man; that this was his first service in attempting to couple a car with a projecting load; the duty he was expected to perform gave him no time to narrowly inspect the approaching car or to observe its condition. His attention was not called to the projecting timber until he was in the very act of making the coupling, and when his effort to avoid it was too late. He had first to throw the switch to receive the approaching car, and then run ahead and get ready to put the pin in the drawhead. It was shown that there was no pin in the drawhead of the stationary car, and he was obliged to pick one up and put it in place ready to make the coupling. These duties gave him no opportunity to closely scan the car that was in rapid motion behind him. In such circumstances, when the whole transaction is the work of a moment, and when his duty calls upon him to act promptly, a man cannot be expected to act with circumspection. At all events, we think that, in view of the fact that the car was improperly loaded, that Everett was new and inexperienced in such work, and that he was required to perform the double duty of throwing the switch and making the coupling, the case was an appropriate one for submission to a jury.

So to the same effect was the holding of the New York Court of Appeals in the case of Goodrich *v.* New York Central & Hudson River R. Co., 5 L. R. A., 750. We quote from that opinion:

> The question as to the plaintiff's contributory negligence was, I think, one of fact for the jury. He testified that, when the cars were four or five feet apart, he saw that the bumper of the moving car was lower than the bumper of the stationary car. It does not appear that he observed that it would pass under the bumper of the stationary car, or that there was any danger that the dead-woods would come together. On the contrary, he appears to have thought that the coupling could be made with the straight link that was in the drawhead. He had a right to assume that fact, and that the coupling appliances were in good order. It was only at the moment that the cars were about to collide that he discovered his error. The court cannot affirm that for such an error of judgment, induced, as it was, to some extent, by defendant's neglect, he is to be held to have been careless. Under such circumstances, when the whole transaction is the occurrence of a moment, a man is not to be held responsible if he errs as to the estimate of the danger that confronts him. If he acts the part of a prudent man, willing to and intending to perform the duty to which he has been assigned, he has done all that the law demands of him; and whether he acted such a part under the circumstances of this case was for the jury to determine.

In the case of Inland & Seaboard Coasting Co. *v.* Tolson, 139 U. S., 551, this court approved an instruction by the trial court to the effect:

> That any negligence of the plaintiff, directly contributing to the injury, would incapacitate him from recovering; and that if he negligently placed his foot between the timbers of the wharf, and allowed it to remain there while the steamboat was departing, and it was injured while so placed, it was for the jury to decide whether there was such negligence as would disentitle him from recovering.
>
> That the burden of proof was on the defendant to show that the plaintiff was negligent and that his negligence contributed to the injury.
>
> That contributory negligence of the plaintiff would not prevent him from recovering, if the defendant

might, by the exercise of reasonable care and prudence, have avoided the consequences of the plaintiff's negligence.

In discussing two instructions given by the judge in the foregoing case, this court said:

> The one, "The burden of proof is, however, upon the defendant to show that the plaintiff was negligent, and that his negligence contributed to the injury," was in accord with the uniform course of decision in this court (Railroad Co. *v.* Gladmon, 15 Wall., 401; Indianapolis & St. Louis R. *v.* Horst, 93 U. S., 291; Hough *v.* Railway Co., 100 U. S., 213; Northern Pacific R. *v.* Mares, 123 U. S., 710, 720, 721).
>
> The other instruction was in these words: "There is another qualification of the rule of negligence, which it is proper that I should mention. Although the rule is that, even if the defendant be shown to have been guilty of negligence, the plaintiff cannot recover if he himself be shown to have been guilty of contributory negligence which may have had something to do in causing the accident; yet the contributory negligence on his part would not exonerate the defendant, and disentitle the plaintiff from recovering, if it be shown that the defendant might, by the exercise of reasonable care and prudence, have avoided the consequences of plaintiff's negligence."
>
> The qualification of the general rule, as thus stated, is supported by decisions of high authority, and was applicable to the case on trial (Radley *v.* London & Northwestern Railway, 1 App. Cas., 754; Scott *v.* Dublin and Wicklow Railway, 11 Irish Com. Law, 377; Austin *v.* New Jersey Steamboat Co., 43 N. Y., 75; Lucas *v.* Taunton & New Bedford Railroad, 6 Gray, 64, 72; Northern Central Railway *v.* Price, 29 Maryland, 420; see also Williamson *v.* Barrett, 13 How., 101, 109).
>
> It was argued that the instruction was inapplicable, because there was no evidence that the defendant knew of the peril of the plaintiff, or had either time or opportunity, by the exercise of any degree of care, to guard against it; that if his negligence consisted in standing in a dangerous position,

> too near the edge of the wharf, the defendant was not bound to anticipate his remaining in that position; but that his negligence in fact consisted in placing his foot between the flooring and a fender pile, which the defendant could not have been aware of or guarded against.
>
> It is true that the instruction could not apply, and therefore, could not be understood by the jury to apply, to the latter alternative. But upon the question of the plaintiff's position and attitude the evidence was conflicting; and it was indisputable that the steamboat was approaching the wharf at his call, and for the purpose of receiving freight from his hands, and that her pilot and officers saw him as he waited on the wharf. The jury might well be of opinion that while there was some negligence on his part in standing where and as he did, yet that the officers of the boat knew just where and how he stood, and might have avoided injuring him if they had used reasonable care to prevent the steamboat from striking the wharf with unusual and unnecessary violence. If such were the facts, the defendant's negligence was the proximate, direct and efficient cause of the injury.

There are two other decisions by this court to be noticed. The first of these is that of the B. & O. Railroad *v.* Baugh, 149 U. S., 368. The court held that the questions in this case were to be determined not by the decisions of the highest court of the State in which the case arises, but by the general law, gleaned from all the authorities and a consideration of the principles underlying the relations of master and servant. While the discussion on this case is based upon the determination of who were fellow-servants, still certain principles as to the relation of master and servant are set forth. We quote from that case:

> Commerce between the States is a matter of national regulation, and to establish it as such was one of the principal causes which led to the adoption of our Constitution. Today the volume of interstate commerce far exceeds the anticipation of those who framed the Constitution, and the main channels

> through which the interstate commerce passes are the railroads of the county. Congress has legislated in respect to this commerce by the Interstate Commerce Act and its amendments (24 Stats., 379, c. 104), but also by an act passed at the last session, requiring the use of automatic couplers on freight cars (Public Acts, 52d Cong., 2d sess., c. 113). The lines of this very plaintiff in error extend into half a dozen or more States, and its trains are largely employed in interstate commerce. As it passes from State to State, must the rights, obligations and duties subsisting between it and its employees change at every State line? If to a train running from Baltimore to Chicago it should, within the limits of the State of Ohio, attach a car for a distance only within that State, ought the law controlling the relation of a brakeman on that car to the company to be different from that subsisting between the brakeman on the through car and the company? Whatever may be accomplished by statute — and of that we have now nothing to say — it is obvious that the relations between the company and employee are not in any sense of the term local in character, but are of a general nature, and to be determined by the general rules of the common law.

This court in Grand Trunk Railway Co. *v.* Ives, 144 U. S., 408, announced certain ruling principles as to negligence, which apply with striking force to the situation in this case. In the Ives case the railroad company was running a train at a speed violative of a city ordinance. This court approved in that case an instruction of the trial court to the effect that, if from the evidence it was found by the jury that the train which inflicted the injury was moving at a rate of speed forbidden by the city ordinance, the law authorized them to infer negligence on the part of the railroad company as one of the facts established by the proof. The question of contributory negligence on the part of the injured party was also passed upon by the court, and it was held that the contributory negligence of the party injured was a question of fact to be determined by the jury. It was further stated by

the court that, although the injured party might have been guilty of want of ordinary care and caution, still the defendant was liable, if by exercising reasonable care and prudence it might have avoided the consequences of the injured party's negligence.

We quote from the syllabus of that case:

> The terms "ordinary care," "reasonable prudence," and similar terms have a relative significance depending upon the special circumstances and surroundings of the particular case.
>
> When a given state of facts is such that reasonable men may clearly differ upon the question as to whether there was negligence or not, the determination of the matter is for the jury; but where the facts are such that all reasonable men must draw the same conclusion from them, the question of negligence is one of law, for the court.
>
> The running of a railroad train within the limits of a city at a greater speed than is permitted by the city ordinance is a circumstance from which negligence may be inferred in case an injury is inflicted upon a person by a train.
>
> In an action against a railroad company to recover for injuries caused by the negligence of its servants, the determination of the fact of whether the person injured was guilty of contributory negligence is a question of fact for the jury.
>
> In such case if the proximate and immediate cause of the injury can be traced to the want of ordinary care and caution in the person injured, an action for the injury cannot be maintained unless it further appears that the defendant might, by the exercise of reasonable care and prudence, have avoided the consequences of the injured party's negligence.
>
> In determining whether the injured party in such case was guilty of contributory negligence, the jury is bound to consider all the facts and circumstances bearing upon the question, and not select one particular fact or circumstance as controlling the case to the exclusion of all others.

In the courts of Pennsylvania, as well as in those of the United States, the trend of decision in the more recent cases is to the effect that, except in cases in which both the evidence and all inferences which may be drawn from it are but one way, the questions of negligence and contributory negligence are for the jury.

Esher *v.* Mineral R. & Min. Co., 28 Pa. Super. Ct., 387.

Kilkeary *v.* Thackeray, 165 Pa., 584.

Hogan *v.* West Mahony Tp., &c., Co., 174 Pa., 352.

Fetterman *v.* Rush Tp., 28 Pa. Super. Ct., 7.

In the present case the trial court withdrew the consideration of both questions from the jury on the ground that the proof disclosed negligence on the part of plaintiff's decedent which directly contributed to his own injuries. Yet it may well be doubted whether there was in truth any evidence at all in the case of negligence on the part of the deceased.

From the mere fact of the occurrence of injury, negligence is not to be presumed. The deceased, a sober and dependable man, fully qualified to perform the duties of his position in the defendant's employ, while endeavoring to perform such duties in a case where the defendant itself was clearly negligent, received the injuries which caused his death.

It does not appear from the evidence that in the course of performing the particular duty which was imposed upon him that he either did or omitted to do anything which the successful performance of that duty necessitated or did anything other than what the desire to successfully perform such duty required. To perform successfully the particular duty required of him necessitated his entering upon a most dangerous place, to go between and underneath the moving cars, to assume a cramped and unnatural position, and while maintaining it, and at the same time keeping pace with the

moving car, to raise and guide towards and into a narrow slot in the opposite drawhead an awkward and heavy iron bar. How was he to guide the bar into the opposite slot unless he raised his eyes, and under such circumstances how could he raise his eyes without elevating the crown of his head? In such circumstances, when the whole transaction was the work of a moment, how can he be charged with having acted with less circumspection than the exigency of the moment required?

Under the generally accepted principles governing the administration of such matters in the courts of Pennsylvania, the question of deceased's negligence ought in all fairness at least to have been left to the judgment of the jury. The refusal of the State court in this instance to conform to such established principles of administration savors of a disposition to evade and render innocuous the provisions of this most beneficent Federal statute.

Upon the whole case, it is respectfully submitted that the judgment of the Supreme Court of Pennsylvania should be reversed and the cause remanded to that court with instructions to reverse the judgment of the court of common pleas of Jefferson county, Pennsylvania, and to remand the cause to that court with instructions to award a new trial.

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